88-1205

Office - Supreme Court, U.S.
FILED
DEC 29 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF

THE UNITED STATES OF AMERICA

No.

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

vs.

ROBERT HICKS,

Appellant.

JURISDICTIONAL STATEMENT

Appeal from the Order of the Supreme
Court of Pennsylvania dated October 19, 1983

Peter B. Skeel, Esquire
SWENSEN & PERER
2201 Lawyers Building
Pittsburgh, PA 15219
(412) 281-1970

IN THE SUPREME COURT OF

THE UNITED STATES OF AMERICA

No.

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

vs.

ROBERT HICKS,

Appellant.

JURISDICTIONAL STATEMENT

Appeal from the Order of the Supreme
Court of Pennsylvania dated October 19, 1983

Peter B. Skeel, Esquire
SWENSEN & PERER
2201 Lawyers Building
Pittsburgh, PA 15219
(412) 281-1970

STATEMENT OF THE QUESTION INVOLVED

The question presented is whether the homicide by vehicle section of the Pennsylvania Motor Vehicle Code, 75 P.S. §3732, is unconstitutional as it denies appellant equal protection. Both homicide by vehicle and uninvoluntary manslaughter are graded as misdemeanors of the first degree, punishable by up to five (5) years incarceration. Homicide by vehicle, however, involves a requirement that the Commonwealth prove only negligence while involuntary manslaughter requires that the Commonwealth prove recklessness or gross negligence. Thus, an individual who has a less culpable state of mind, mere negligence, is subjected to the same punishment as one who was reckless and, therefore, has a more culpable state of mind. No rational basis exists for this classification and, accordingly, the Pennsylvania Supreme Court erred in holding that the provision does not run afoul of the federal constitution.

LIST OF PARTIES TO THE PROCEEDING

1. Commonwealth of Pennsylvania.

2. Robert Hicks.

3. Attorney General of the Commonwealth of Pennsylvania.

TABLE OF CONTENTS

	Page
Question Presented	1
List of Parties to the Proceeding	2
Table of Citations	3
Reports of Opinions Below	4
Statement of Grounds on Which Jurisdiction is Involved	5
Constitutional Provisions and Statutes Involved	7
Statement of the Case	8
Existence of a Substantial Federal Question	9
Appendix	10

TABLE OF CITATIONS

Cases: **Page**

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) 6

Statutes:

U.S. Constitution Amendment XIV 7

75 P.S. §3732 ..... 5, 7, 8

18 P.S. §2504 7

28 U.S.C.A. §1257 5

REPORTS OF OPINIONS BELOW

1. Opinion of the Supreme Court of Pennsylvania: **Commonwealth v. Hicks**, 1 W.D. 1983 (Pa. 1983)

2. Opinon of the Court of Common Pleas of Allegheny County: **Commonwealth v. Hicks**, 131 P.L.J. 359 (1983)

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

The proceeding is an appeal from the Supreme Court of Pennsylvania is reversal of the lower court's quashing of the criminal information charging the defendant, Robert Hicks, with homicide by vehicle, 75 P.S. §3732. The lower court had quashed the information on grounds that the homicide by vehicle statute violated vehicle protection clauses of the Pennsylvania and United States Constitutions.

The opinion and order of the Supreme Court of Pennsylvania which appellant herein seeks to have reviewed was entered on October 19, 1983. A notice of appeal was filed on October 28, 1983 in the Supreme Court of Pennsylvania.

Jurisdiction in the Supreme Court of the United States exists by virtue of 28 U.S.C.S. §1257 which provides, in pertinent part, as follows:

> "Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ...
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

With regard to case law sustaining jurisdiction, appellant relys on **Cox Broadcasting Corp v. Cohn**, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 2d 328 (1975) as to the finality of the State court decision. Although the case has been remanded for trial after the Supreme Court of Pennsylvania has rejected the Federal Constitutional challenge to Pennsylvania's homicide by vehicle statute, reversal of the Pennsylvania Supreme Court on a Federal issue would preclude further litigation. Thus the case at the bar falls squarely within the ruling of the Court in **Cox Broadcasting Corp,** Supra. To require the case herein to be tried and appealed to the Pennsylvania Superior and to the Pennsylvania Supreme Court would be to require frilvilous appeals. Pennsylvania's Suprior Court would rule that the Pennsylvania Supreme Court's decision on the Federal issue was the law of the case and accordingly would rule that the Supreme Court's decision, which is sought to be reviewed here and, is binding. Pennsylvania Supreme Court would likewise hold that the issue has already been decided in its earlier opinion.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. CONSTITUTION
AMENDMENT XIV

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

75 P.S. §3732. Homicide by vehicle

Any person who unintenionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violtion is the cause of death.

1976, June 17, P.L. 162, No. 81, §1, eff. July 1, 1977.

18 P.S. §2504. Involuntary manslaughter

(a) General rule. — A person is guilty of involuntary manslaughter when a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person.

(b) Grading. — Involuntary manslaughter is a misdemeanor of the first degree.

1972, Dec. 6, P.L. 1482, No. 334, §1, effective June 6, 1973.

STATEMENT OF THE CASE

This is an appeal from the Opinion and Order of the Supreme Court of Pennsylvania reversing the Order of the Trial Court which granted appellant's Motion to Quash the information charging him with violation of the Homicide by Vehicle Statute, 75 P.S. §3732, as violative of the federal equal protection clause of the United States Constitution.

The appellant was charge with homicide by vehicle and a Motion to Quash the information was filed on his behalf challenging the constitutionality of the Homicide by Vehicle Statute. The Honorable John W. O'Brien of the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, granted the Motion to Quash holding that the statute violated the equal protection clauses of the United States and Pennsylvania Constitutions. The Commonwealth appealed the decision to the Supreme Court of Pennsylvania, the Commonwealth having the right of direct appeal to the Supreme Court of Pennsylvania pursuant to 42 P.S. §722(7) where the Court of Common Pleas holds a state statute to be repugnant to either the United States or Pennsylvania Constitution. The Supreme Court of Pennsylvania rejected the constitutional challenge, and reversed the Order of the Court of Common Pleas of Allegheny County, Pennsylvania, and remanded the case for trial. This appeal followed.

EXISTENCE OF A SUBSTANTIAL FEDERAL QUESTION

The question involved herein is one of first impression. The legislature in Pennsylvania has established an overbroad classification by treating individuals with distinctly different mens reas alike. Through the legislation challenged herein, one whose conduct and state of mind is less blameworthy than another is subjected to the same punishment. There is no rational basis for this.

The apparent goal of the legislature in enacting the Homicide by Vehicle Statute was to reduce highway fatalitites. This does not, however, justify the classification of both reckless and merely negligent individuals the same.

There are no federal cases dealing with this issue. With the increase in interest in cases involving deaths on the highways, statutes similar to the one enacted in the Commonwealth of Pennsylvania are likely to be enacted where severe sanctions are imposed that equal or exceed those for crimes involving a more culpable state of mind. Accordingly, the issue presented herein is of great importance in the Commonwealth of Pennsylvania where there are a substantial number of individuals prosecuted under the provision challenged herein. As the case is one of first impression, and there has been no similar challenge presented to this Court, a substantial federal question is involved.

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant v. ROBERT HICKS	No. 1 W. D. Appeal Docket 1983 Appeal from the Order of the Court of Common Pleas of Allegheny County, Criminal Division, at No. CC8203243A, dated November 30, 1982, granting Appellee's Motion to Quash the Information.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of COMMON PLEAS OF ALLEGHENY COUNTY, be, and the same is hereby reversed and record remanded for trial.

BY THE COURT:

Carl Rice

Carl Rice, Esquire
Prothonotary

Dated: October 19, 1983

11

Best Copy Available

IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Appellant	No. 1 W.D. Appeal Docket, 1983.
V.	Appeal from the Order of the Court of Common Pleas of Allegheny County, Criminal Division, at No. CC8203243A, dated November 30, 1982, granting Appellee's Motion to Quash the Information.
ROBERT HICKS	
	ARGUED: September 13, 1983.

OPINION OF THE COURT

ROBERTS, C.J.

FILED: OCTOBER 19, 1983

This is a direct appeal by the Commonwealth from an order of the Court of Common Pleas of Allegheny County which granted a pre-trial motion to quash an information charging appellee Robert Hicks with homicide by vehicle, 75 Pa. C.S. § 3732. The court of common pleas held that the homicide by vehicle statute is unconstitutional on the ground that it violates the equal protection clause of the fourteenth amendment to the Constitution of the United States and the prohibition against special legislation contained in article III, section 32 of the Constitution of the Commonwealth of Pennsylvania. We reverse the order of the court of common pleas and remand for trial.[1]

[Footnote 1 is on p.2]

[237-2]

The information filed against appellee alleges that on April 3, 1982, appellee, while intoxicated, entered Interstate Route 79 by driving his automobile the wrong way down an exit ramp, and that while travelling north in the southbound lanes of Interstate 79, appellee's vehicle struck an oncoming vehicle, killing one of its occupants. Appellee was charged with homicide by vehicle as well as driving under the influence of alcohol, 75 Pa. C.S. § 3731, driving in the wrong direction on a divided highway, 75 Pa. C.S. § 3311(a), reckless driving, 75 Pa. C.S. § 3714, and driving while his operating privilege was suspended, 75 Pa. C.S. § 1543(a).[2]

At the time of the alleged offense, 75 Pa. C.S. § 3732 provided:

> "Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death."[3]

---

1. We hear this direct appeal pursuant to 42 Pa. C.S. § 722(7), which provides that this Court shall have exclusive appellate jurisdiction in "[m]atters where a court of common pleas had held invalid as repugnant to the Constitution . . . of the United States, or to the Constitution of this Commonwealth, . . . any statute of this Commonwealth. . . ."

2. These latter charges were not affected by the trial court's dismissal of the charge of homicide by vehicle.

3. The Vehicle Code was amended by the Act of December 15, 1982, P.L. 1268, to create a new offense, homicide by vehicle while driving under the influence, 18 Pa. C.S. § 3735. The amendment took effect on January 14, 1983, after the occurrence of the offense alleged in this case.

[237-3]

In Commonwealth v. Field, 490 Pa. 319, 417 A.2d 160 (1980), this Court held that under section 3732 the Commonwealth must show that the defendant "knew or should have known" that he engaged in the conduct claimed to be in violation of the Vehicle Code, and that, at the very least, death was a "probable consequence" of that conduct. Commonwealth v. Field, 490 Pa. at 325, 417 A.2d at 163. Accord, Commonwealth v. Houtz, 496 Pa. 345, 437 A.2d 385 (1981).

In declaring section 3732 unconstitutional, the court of common pleas proceeded on the assumption that the goal of the Legislature in enacting section 3732 was to reduce the number of fatalities on our highways. The Court concluded that section 3732 was irrational by accepting as true the view that "punishment of a negligent offender in no way implements [deterrence] since the negligent harmdoer is, by definition, unaware of the risk he imposes on society," Slip op. at 10, quoting Comment, Is Criminal Negligence a Defensible Basis for Penal Liability?, 16 Buffalo L.Rev. 749, 751 (1967)(footnotes omitted).[4]

Under the equal protection clause, the test of the validity of a statutory classification which does not implicate "fundamental

---

4. The court supported its conclusion by observing that the Legislature had available more effective means of achieving its objective. It is, of course, improper for a court to substitute its policy judgment for that of the Legislature. See, e.g., Hodel v. Indiana, 452 U.S. 314, 331-32, 101 S.Ct. 2376, 2386-87 (1981); Daniel v. Family Life Insurance Co., 336 U.S. 220, 224, 69 S.Ct. 550, 553 (1949).

interests" or affect with particularity a "suspect class" is whether the classification bears a rational relationship to a legitimate state interest. See, e.g., Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 97 S.Ct. 1898 (1977). This Court has held that the prohibition against special legislation contained in article III, section 32 of the Pennsylvania Constitution also requires that legislative classifications "have some rational relation to a proper state purpose." Baltimore & Ohio Railroad Co. v. Dep't. of Labor & Industry, 461 Pa. 68, 83, 334 A.2d 636, 643 (1975).

Although the court of common pleas properly framed the goal of the homicide by vehicle statute as the reduction of highway fatalities, the court improperly concluded that the classifications drawn by the statute are not rationally related to that goal. By focusing on drivers who know or should know that they are engaging in conduct constituting a Vehicle Code violation, of which death is a probable consequence, section 3732 seeks only to sanction those persons who should reasonably anticipate that their conduct is likely to produce death, in much the same manner as the law of torts imposes liability against only those wrongdoers who should reasonably have anticipated the harm resulting from their conduct. It has long been perceived that the imposition of liability for negligent conduct tends to improve the quality of social conduct. See W. Prosser, Law of Torts 14-16 (4th ed. 1971). As the judgment by the Legislature to borrow from concepts of tort law in imposing liability under section 3732 bears a rational relationship to the

Legislature's goal, it must be concluded that the Legislature's enactment of section 3732 was a constitutional exercise of its lawmaking authority. Accordingly, the order of the court of common pleas holding unconstitutional the homicide by vehicle statute must be reversed and the record remanded for trial.[5]

Order reversed and record remanded for trial.

---

5. Appellee urges that 75 Pa. C.S. § 3732 violates equal protection on the additional ground that the offenses of homicide by vehicle and involuntary manslaughter, 18 Pa. C.S. § 2504, are classified as misdemeanors of the first degree, punishable by as much as five years' imprisonment, nothwithstanding the different standards of proof for the two offenses. See Commonwealth v. Houtz, supra. Appellee, however, overlooks the fact that the class of individuals responsible for non-vehicle deaths which are unintentional and the class of persons whose violations of the Vehicle Code cause death are not similarly situated with respect to the homicide by vehicle statute's distinct purpose of reducing highway fatalities. The Supreme Court of Colorado rejected a similar challenge to a vehicular homicide statute in People v. Hulse, 192 Colo. 302, 557 P.2d 1205 (1976), holding that equal protection considerations are implicated only where the same criminal conduct is proscribed by both statutes.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA)
)
v.) No. CC8203243
)
ROBERT HICKS)

_O_P_I_N_I_O_N_

O'BRIEN, J.
February 24, 1983

Defendant, Robert Hicks, is charged at the above number with one count of violation of the Homicide by Vehicle Statute (75 Pa. C.S. §3732). He timely filed a motion to quash the criminal information, alleging the following:

> 5. The act of June 17, 1976, P.L. 162, No. 81, §1, effective July 1, 1977; 75 Pa. C.S.A. §3732, Homicide by Vehicle, violates the federal and Pennsylvania Constitutions because it imposes strict criminal liability without any requirement of mens rea or its equivalent, thereby depriving defendant of due process and equal protection of the laws.
>
> 6. The legislature has designated homicide by vehicle as a misdemeanor of the first degree, thereby classifying it with involuntary manslaughter, 18 C.P.S.A. §2504, which requires proof of recklessness or gross negligence. There is no rational basis for classifying the offenses equally; by doing so the legislature has exceeded its power, denied defendant equal protection and due process of law guaranteed by the federal and state constitutions, and subjects defendant to cruel and unusual punishment in violation of the Eights [sic] Amendment to the United States Constitution and Article 1, Section 13 of the Pennsylvania Constitution.

Oral argument was held on August 5 and November 30, 1982. On the latter date this writer granted defendant's motion for reasons which follow.

I

Mens Rea

Section 3732 defines Homicide by Vehicle as follows:

> "Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death."

Initially the court notes its disagreement with defendant's contention that Section 3732 is unconstitutional because it "imposes strict criminal liability without any requirement of mens rea." While that may have been the legislature's intent, our Supreme Court has held that the Commonwealth must prove the accused "knew or should have known" he or she engaged in the conduct constituting a violation of the underlying vehicle code section or local ordinance. Commonwealth v. Field, 490 Pa. 519, 525, 417 A.2d 160, 163 (1980). Thus, it appears the court has read into Section 3732 a simple negligence culpability requirement.[1]

---

[1] Under Section 3732 the Commonwealth need not show criminal negligence as defined by the Crimes Code (75 Pa. C.S.A. §302(b)(4)). Commonwealth v. Koch, 297 Pa. Super. 350, 443 A.2d 1159 (1982).

II

RIPENESS

Subsequent to the Court's November 30, 1982, entry of the order quashing the information, the Commonwealth filed an Application for Reconsideration, arguing for the first time that defendant's equal protection arguments, "as they relate to the cruel and unusual punishment provisions of the Eighth Amendment to the United States Constitution and Article 1, Section 13 of the Pennsylvania Constitution," are not ripe for consideration.[2] For this proposition the Commonwealth cites Commonwealth v. Lang, 285 Pa. Super. 34, 426 A.2d 691 (1981).

In Lang the lower court quashed an information charging defendant with Vehicular Homicide on the basis it did not allege sufficient causation between his act and the victim's death. The Commonwealth appealed. Defendant cross-appealed, arguing, inter alia, Section 3732 imposes cruel and unusual punishment. The Superior Court refused to consider this argument, holding it was not ripe for review as defendant had been neither convicted nor sentenced. While Lang precludes consideration of defendant's cruel and unusual punishment argument, it does not speak to the issue of equal protection.

> "The proper procedure for challenging the validity of a criminal statute is to file a pretrial motion to quash the indictment. Obviously, the purpose of resolving constitutional challenges prior to trial is to conserve time and expense if the challenge is successful." Commonwealth v. West, 270 Pa. Super. 301, 311, 411 A.2d 537, 542-43 (1979) (Gates, J., concurring).

---

[2] The Commonwealth's Application for Reconsideration was denied on December 29, 1982.

Defendant's equal protection argument is a facial attack on the constitutionality of classifying Section 3732 as a misdemeanor of the first degree. Constitutional challenges to Section 3732 were addressed on the merits in pre-trial appeals by our appellate courts in Commonwealth v. Field, supra, Commonwealth v. Burt, 490 Pa. 173, 415 A.2d 89 (1980), and Commonwealth v. Spurgeon, 295 Pa. Super. 563, 428 A.2d 189 (1981).

In Commonwealth v. Danko, 281 Pa. Super 97, 421 A.2d 1165 (1980), appellant was convicted of criminal solicitation and prostitution. On appeal one of her constitutional attacks on the prostitution statute was that it denied her

> "equal protection of the laws in violation of the Fourteenth Amendment because the prostitute's patron is guilty of only a summary offense under section 5902(e) while the prostitute is guilty of a misdemeanor of the third degree under section 5902(a). Cf. Commonwealth v. Bonadio, ____ Pa. ____, 415 A.2d 47 (1980) (violation of equal protection found where statute made sodomy criminal depending on the defendants' marital status)."

The court held:

> "We may not consider appellant's constitutional arguments. Although they clearly could have been raised in a pre-trial motion appellant filed no pre-trial motion contesting the constitutionality of section 5902. See Pa. R. Crim. P., Rule 306. Perhaps her failure to raise her constitutional arguments before trial alone requires this court to find that she waived her facial constitutional challenges to the statute. See Commonwealth v. Barone, ____ Pa. Super. ____, 419 A.2d 457, 460-61 (1980) (Opinion by CERCONE, P.J., joined by CAVANAUGH, J.); Commonwealth v. Ashford, ____ Pa. Super. ____, ____, 407 A.2d 1328, 1330-31 (1979), citing Commonwealth v. Warren, 475 Pa. 31, 379 A.2d 561 (1977)."
> 281 Pa. Super. 109, 421 A.2d 1167 (emphasis added)

However, the court was not required to find a waiver through appellant's failure to raise the equal protection argument pre-trial since she also failed to make the argument during trial.

Hence, it appears from the foregoing authorities that not only was the equal protection issue in the present case ripe for consideration by this Court, but defendant's failure to raise it at this stage would probably have precluded him from raising it on appeal in the event of a conviction.

III

EQUAL PROTECTION

Under 18 Pa. C.S. §2504(a),

> "A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person."

> "The state of mind, or *mens rea*, which characterizes involuntary manslaughter is recklessness or gross negligence: a great departure from the standard of ordinary care evidencing a disregard for human life or an indifference to the possible consequences of the actor's conduct. Commonwealth v. Polimeni, 474 Pa. 430, 442, 378 A.2d 1189, 1195 (1977); Commonwealth v. Kominsky, 240 Pa. Super. 532, 539, 361 A.2d 794 (1976). . .
>
> Conduct made unlawful by the Motor Vehicle Code is not necessarily the kind of 'unlawful act' included within the definition of involuntary manslaughter, for in many instances, the Code makes unlawful, acts of ordinary negligence." Commonwealth v. Agnew, 263 Pa. Super 424, 427, 398 A.2d 209, 211 (1979).

Since involuntary manslaughter is classified as a misdemeanor of the first degree (18 Pa. C.S. 2504 (b)), it carries a maximum sentence of

2-1/2 to 5 years (18 Pa. C.S. §§1104, 1356(b)). As stated previously Vehicular Homicide is likewise classified.[3] By enacting Section 3732 the legislature intended to "expand the scope of criminal liability for violations of the Vehicle Code causing death." Commonwealth v. Field, 490 Pa. at 525 n.4, 417 A.2d at 163 n.4. In Commonwealth v. Houtz, the court held that

> "This legislative 'expansion' was accomplished not by the elimination of any of the elements of the crime of involuntary manslaughter, but by a relaxation of the degree of proof of two existing elements: culpable conduct and causation. The crime of involuntary manslaughter, as charged here requires proof that the actor engaged in the Vehicle Code violation in a 'reckless or grossly negligent manner' and that the death was caused 'as a direct result.' 18 Pa. C.S. §2504. See Commonwealth v. Clowser, 212 Pa. Super. 208, 239 A.2d 870 (1968). By contrast, under the crime of homicide by vehicle, it must be shown only that the actor 'knew or should have known' that he engaged in the conduct claimed to be in violation of the Vehicle Code, and that, at the very least, death was a 'probable consequence' of the conduct. Commonwealth v. Field, 490 Pa. at 525, 417 A.2d at 163."
> 469 Pa. 345, 348-9, 417 A.2d 385, 387 (1981)

In nonmotorist involuntary manslaughter cases the Commonwealth must likewise prove beyond a reasonable doubt that defendant's reckless or grossly negligent conduct caused the victim's death. Commonwealth v. Moore, 463 Pa. 317, 344 A.2d 850 (1975) (Criminal

---

[3] The instant charge was filed against defendant prior to the effective date of the Sentencing Code, 204 Pa. Code Ch. 303, 42 Pa. C.S.A. §9721.

negligence could have been found where defendant placed a loaded gun in her purse and struggled with victim while defendant's and victim's hands were on gun); Commonwealth v. Feinburg, 433 Pa. 558, 253 A.2d 636 (1969) (recklessness found in sale of toxic sterno, where seller knew purchasers were alcoholics who would drink it); Commonwealth v. Gilliland, 281 Pa. Super 354, 422 A.2d 206 (1980) (evidence insufficient to prove gross negligence where defendant, operating his motor boat on a lake, failed to observe decedent's boat approaching in time to avoid collision); Commonwealth v. Youngkin, 285 Pa. Super, 417, 427 A.2d 1356 (1981) (recklessness found where physician "prescribed Tuinal to the decedent in quantities and frequencies term irresponsible and toally inappropriate," ultimately causing her death, where decedent's abuse of the drug had been previously brought to the physician's attention.) 285 Pa. Super at 27, 427 A.2d at 1361.

The issue in the present case can be framed in the following manner: Are motorists prosecuted for causing accidental death being denied equal protection of the law, as compared with nonmotorists who cause accidental death, in that to prove a misdemeanor of the first degree against a motorist the Commonwealth need only prove that the victim's death was a probable result of defendant's simple negligence, whereas to prove a first degree misdemeanor against a nonmotorist in an accidental death case, the

prosecution must prove the victim's death was a direct result of at least gross negligence on defendant's part?[4]

---

[4] A motorist-nonmotorist equal protection argument was rejected by the Court of Common Pleas of Adams County on the basis that a "classification based on those persons subject to the provisions of the Vehicle Code and those persons not so subject. . .is rationally related to. . .safety on the highways." Commonwealth v. Beams, 10, D & C 3d 616, 617 (1978). One of the bases of the court's decision may have been its incorrect view that criminal negligence under 18 Pa. C.S. §302 is required for a vehicular homicide conviction. The same result was reached by the Court of Common Pleas of Potter County, with virtually no discussion of the issue. Commonwealth v. Clark, 17 D & C 3d 778,781, (1981).

That equal protection is denied by section 3732 because it discriminates between vehicle code violators who cause death and those who do not was also rejected in Beams, supra, as well as in Commonwealth v. Sloat, 11 D & C 3d 745 (York County, 1979). See also, concurring opinion of Judge Popovich in Commonwealth v. Koch, supra.

In Commonwealth v. Field, supra, our Supreme Court declined to discuss the equal protection arguments raised by appellant in the lower court since they were not pursued on appeal.

In cases not involving a suspect classification the well-recognized applicable rule has been stated thus:

> "The Equal Protection Clause of [the state and federal] constitutions does not deny the State the power to treat different classes of persons in different ways, but does deny the right to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the particular statute. The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." Commonwealth v. Bonadio, 490 Pa. 91, 98, 415 A.2d 47, 51 (1980).

The Commonwealth argues a rational basis exists for such differential treatment of motorists "in that there existed a need for a distinct offense due to the reluctance of juries to convict for involuntary manslaughter." Commonwealth's Brief, p. 2. An increase in the number of first degree misdemeanor convictions for vehicle-related deaths can hardly supply the rational basis needed to justify Section 3732. Otherwise the statute could withstand constitutional attack even if interpreted as imposing strict criminal liability. A conviction cannot be an end in itself.

It cannot be denied that the reduction of vehicle-related accidental deaths is a desirable and proper legislative goal. However, this is equally true for nonvehicle-related accidental deaths. This having been said, the argument may, with surface appeal, be made that the carnage on our highways has reached alarming proportions, and that other methods of attempting to reverse this trend (such as prosecutions for involuntary manslaughter) have proven inadequate. However, this

argument assumes that the existence of Section 3732 will significantly reduce the incidence of highway death, in that potential Vehicle Code violators will be deterred from such violations.[5] However, it has been correctly observed (in this writer's view) that:

> "The deterrence theory of criminal law is based on the hypothesis that the prospective offender knows that he will be punished for any criminal activity, and, therefore, will adjust his behavior to avoid committing a criminal act. This theory rests on the idea of 'rational utility,' i.e., prospective offenders will weight the evil of the sanction against the gain of the contemplated crime. However, punishment of a negligent offender in no way implements this theory, since the negligent harm-doer is, by definition, unaware of the risk he imposes on society. It is questionable whether holding an individual criminally liable for acts the risks of which he has failed to perceive will deter him [or others] from failing to perceive in the future."
>
> Comment, Is Criminal Negligence a Defensible Basis for Penal Liability? 16 Buffalo L. Rev. 749, 751 (1967) (footnotes omitted).[6]

It simply defies common sense, for example, that motorists will be deterred from forgetting to "discontinue" their turn signal "immediately upon completing [a] turn," because they face a possible

---

[5] It must be borne in mind that the forseeability of death or even bodily injury is not a relevant factor in determining guilt under Section 3732.

[6] For a scholarly treatment on the same subject, see Hall, Negligent Behavior Should Be Excluded From Penal Liability, 63 Colum. L. Rev. 632, 641 (1963).

five years in jail in the extremely unlikely event someone dies as a result of such violation. (75 Pa. C.S. §3334(d))[7] It should be obvious that more effective methods of deterring Vehicle Code violations exist, such as automatic license suspension or mandatory and stiffer fines for a wider range of traffic offenses. For more serious violations, such as reckless driving or excessive speeding resulting in death, a first degree misdemeanor classification may pass constitutional muster. Such measures may not be a panacea, but at least they make more sense than saying to the motorists on our highways: "You are entitled to drive recklessly three times with virtually no chance of imprisonment, minimal fines and no license suspension,[8] but if you are lawfully traveling 36 miles per hour and you change lanes after signaling for only 200 feet prior to doing so,[9] and someone dies as a result, you may do hard time with ax murderers."

---

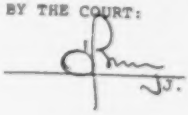
[7] The underlying Vehicle Code violations charged in the instant case are Driving Under the Influence of Acohol (§3731), Driving on the Wrong Side of the Roadway (§3311), and Reckless Driving (§3731). However, defendant is attacking Section 3732 "on its face", and not merely "as applied" to him. Commonwealth v. Bonadio, supra. The Commonwealth has not argued defendant lacks standing except to the extent he has not yet been convicted or sentenced. See II, supra, of this Opinion.

[8] Three points are assessed against a driver for reckless driving. 75 Pa. C.S. §1535. Upon accumulation of 11 points (the first time), PennDot will suspend the license five days for each point. 75 Pa. C.S. §1539.

[9] 75 Pa. C.S. §3334(b).

Accordingly, the criminal information against defendant was properly quashed as violating his rights under the United States and Pennsylvania constitutions.

BY THE COURT:



J.

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant	)	
vs.	)	No. 3 W.D. Appeal Docket, 1983
ROBERT HICKS, Appellee	)	

NOTICE OF APPEAL

Defendant, Robert Hicks, hereby appeals to the Supreme Court of the United States of America from the Order and Judgment of the Supreme Court of Pennsylvania entered on the 19th day of October, 1983. This appeal is taken pursuant to 28 U.S.C.S. §1257.

SWENSEN & PERER

Peter B. Skeel, Esquire

CERTIFICATION OF SERVICE

I hereby certify that I am this 28th day of October, 1983 serving the following persons by first class mail, postage pre-paid, which service satisfies the requirements of Rule 28.

The Honorable Leroy S. Zimmerman
Attorney General of the Commonwealth
of Pennsylvania
Office of the Attorney General
1531 Strawberry Square
Harrisburg, PA 17120

Robert L. Eberhardt, Esquire
District Attorney's Office
401 Courthouse
Pittsburgh, PA 15219

SWENSEN & PERER

Peter B. Skeel, Esquire

PROOF OF SERVICE

I hereby certify that I am this 28th day of December, 1983, serving the following persons by first class mail, postage prepaid, which service satisfies the requirements of Rule 28.

The Honorable Leroy s. Zimmerman
Attorney General of the Commonwealth
of Pennsylvania
Office of the Attorney General
1531 Strawberry Square
Harrisburg, Pa. 17120

Robert L. Eberhardt, Esquire
District Attorney's Office
401 Courthouse
Pgh., Pa. 15219

SWENSEN & PERER

By _____
PETER B. SKEEL, ESQUIRE

83-1205

Office - Supreme Court, U.S.
FILED
DEC 29 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF

THE UNITED STATES OF AMERICA

No.

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

vs.

ROBERT HICKS,

Appellant.

AMENDED APPENDIX

Appeal from the Order of the Supreme
Court of Pennsylvania dated October 19, 1983

Peter B. Skeel, Esquire
SWENSEN & PERER
2201 Lawyers Building
Pittsburgh, PA 15219
(412) 281-1970

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant	No. 1 W.D. Appeal Docket, 1983.
V.	Appeal from the Order of the Court of Common Please of Allegheny County, Criminal Division, at No. CC8203243A,
ROBERT HICKS	dated November 30, 1982, granting Appellee's Motion to Quash the Information.

JUDGMENT

ON CONSIDERATON WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of COMMON PLEAS OF ALLEGHENY COUNTY, be, and the same is hereby reversed and record remanded for trial.

BY THE COURT:

Carl Rice

Carl Rice, Esquire
Prothonotary

Dated: October 19, 1983

IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Appellant	No. 1 W.D. Appeal Docket, 1983.
V.	Appeal from the Order of the Court of Common Pleas of Allegheny County, Criminal
ROBERT HICKS	Division, at No. CC8203243A, dated November 30, 1982, granting Appellee's Motion to Quash the Information.
	ARGUED: September 13, 1983.

OPINION OF THE COURT

ROBERTS, C.J. FILED: OCTOBER 19, 1983

This is a direct appeal by the Commonwealth from an order of the Court of Common Pleas of Allegheny County which granted a pre-trial motion to quash an information charging appellee Robert Hicks with homicide by vehicle, 75 Pa. C.S. § 3732. The court of common pleas held that the homicide by vehicle statute is unconstitutional on the ground that it violates the equal protection clause of the fourteenth amendment to the Constitution of the United States and the prohibition against special legislation contained in article III, section 32 of the Constitution of the Commonwealth of Pennsylvania. We reverse the order of the court of common pleas and remand for trial.[1]

[Footnote 1 is on p.13]

The information filed against appellee alleges that on April 3, 1982, appellee, while intoxicated, entered Interstate Route 79 by driving his automobile the wrong way down an exit ramp, and that while travelling north in the southbound lanes of Interstate 79, appellee's vehicle struck an oncoming vehicle, killing one of its occupants. Appellee was charged with homicide by vehicle as well as driving under the influence of alcohol, 75 Pa. C.S. § 3731, driving in the wrong direction on a divided highway, 75 Pa. C.S. § 3311 (a), reckless driving, 75 Pa. C.S. § 3714, and driving while his operating privilege was suspended, 75 Pa. C.S. § 1543(a).[2]

At the time of the alleged offense, 75 Pa. C.S. § 3732 provided:

> "Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death."[3]

---

[1]We hear this direct appeal pursuant to 42 Pa. C.S. §722(7), which provides that this Court shall have exclusive appellate jurisdiction in "[m]atters where a court of common pleas had held invalid as repugnant to the Constitution . . . of the United States, or to the Constitution of this Commonwealth, . . . any statute of this Commonwealth. . . ."

[2]These latter charges were not affected by the trial court's dismissal of the charge of homicide by vehicle.

[3]The Vehicle Code was amended by the Act of December 15, 1982, P.L. 1268, to create a new offense, homicide by vehicle while driving under the influence, 18 Pa. C.S. §3735. The amendment took effect on January 14, 1983, after the occurrence of the offense alledged in this case.

[237-3]

In *Commonwealth v. Field*, 490 Pa. 519, 417 A.2d 160 (1980), this Court held that under section 3732 the Commonwealth must show that the defendant "knew or should have known" that he engaged in the conduct claimed to be in violation of the Vehicle Code, and that, at the very least, death was a "probable consequence" of that conduct. *Commonwealth v. Field*, 490 Pa. at 525, 417 A.2d at 163. Accord, *Commonwealth v. Houtz*, 496 Pa. 345, 437 A.2d 385 (1981).

In declaring section 3732 unconstitutional, the court of common pleas proceeded on the assumption that the goal of the Legislature in enacting section 3732 was to reduce the number of fatalities on our highways. The Court concluded that section 3732 was irrational by accepting as true the view that "punishment of a negligent offender in no way implements [deterrence] since the negligent harmdoer is, by definition, unaware of the risk he imposes on society," Slip op. at 10, quoting Comment, *Is Criminal Negligence a Defensible Basis for Penal Liability?*, 16 Buffalo L.Rev. 749, 751 (1967) (footnotes omitted).[4]

Under the equal protection clause, the test of the validity of a statutory classification which does not implicate "fundamental interests" or affect with particularity a "suspect class" is whether the classification bears a rational relationship to a legitimate state interest. See, e.g., *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 97 S.Ct. 1898 (1977). This Court has held that the prohibition against special legislation contained in article III, section 32 of the Pennsylvania Constitution also requires that legislative classifications "have some rational relation to a proper state purpose." *Baltimore & Ohio Railroad Co. v. Dep't. of Labor & Industry*, 461 Pa. 68, 83, 334 A.2d 636, 643 (1975).

---

[4]The court supported its conclusion by observing that the Legislature had available more effective means of achieving its objective. It is, of course, improper for a court to substitute its policy judgment for that of the Legislature. See, e.g., *Hodel v. Indiana*, 452 U.S. 314, 331-32, 101 S.Ct. 2376, 2386-87 (1981); *Daniel v. Family Life Insurance Co.*, 336 U.S. 220, 224, 69 S.Ct. 550, 553 (1949).

Although the court of common pleas properly framed the goal of the homicide by vehicle statute as the reduction of highway fatalities, the court improperly concluded that the classifications drawn by the statute are not rationally related to that goal. By focusing on drivers who know or should know that they are engaging in conduct constituting a Vehicle Code violation, of which death is a probable consequence, section 3732 seeks only to sanction those persons who should reasonably anticipate that their conduct is likely to produce death, in much the same manner as the law of torts imposes liability against only those wrongdoers who should reasonably have anticipated the harm resulting from their conduct. It has long been perceived that the imposition of liability for negligent conduct tends to improve the quality of social conduct. See W. Prosser, Law of Torts 14-16 (4th ed. 1971). As the judgment by the Legislature to borrow from concepts of tort law in imposing liability under section 3732 bears a rational relationship to the Legislature's goal, it must be concluded that the Legislature's enactment of section 3732 was a constitutional exercise of its lawmaking authority. Accordingly, the order of the court of common pleas holding unconstitutional the homicide by vehicle statute must be reversed and the record remanded for trial.[5]

Order reversed and record remanded for trial.

---

[5]Appellee urges that 75 Pa. C.S. §3732 violates equal protection on the additional ground that the offenses of homicide by vehicle and involuntary manslaughter, 18 Pa. C.S. §2504, are classified as misdemeanors of the first degree, punishable by as much as five years' imprisonment, notwithstanding the different standards of proof for the two offenses. See *Commonwealth v. Houtz*, supra. Appellee, however, overlooks the fact that the class of individuals responsible for non-vehicle deaths which are unintentional and the class of persons whose violations of the Vehicle Code cause death are not similarly situated with respect to the homicide by vehicle statute's distinct purpose of reducing highway fatalities. The Supreme Court of Colorado rejected a similar challenge to a vehicular homicide statute in *People v. Hulse*, 192 Colo. 302, 557 P.2d 1205 (1976), holding that equal protection considerations are implicated only where the same criminal conduct is prescribed by both statutes.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
v.	)	No. CC8203243
	)	
ROBERT HICKS	)	
	)	

OPINION

O'BRIEN, J.
February 24, 1983

Defendant, Robert Hicks, is charged at the above number with one count of violation of the Homicide by Vehicle Statute (75 Pa. C.S. §3732). He timely filed a motion to quash the criminal information, alleging the following:

> 5. The act of June 17, 1976, P.L. 162, No. 81, §1, effective July 1, 1977; 75 Pa. C.S.A. §3732, Homicide by Vehicle, violates the federal and Pennsylvania Constitutions because it imposes strict criminal liability without any requirement of mens rea or its equivalent, thereby depriving defendant of due process and equal protection of the laws.
>
> 6. The legislature has designated homicide by vehicle as a misdemeanor of the first degree, thereby classifying it with involuntary manslaughter, 18 C.P.S.A. §2504, which requires proof of recklessness or gross negligence. There is no rational basis for classifying the the offenses equally; by doing so the legislature has exceeded its power, denied defendant equal protection and due process of law guaranteed by the federal and state constitutions, and subjects defendant to cruel and unusual punishment in violation of the Eights [sic] Amendment to the United States Constitution and Article 1, Section 13 of the Pennsylvania Constitution.

Oral argument was held on August 5 and November 30, 1982. On the latter date this writer granted defendant's motion for reasons which follow.

I

MENS REA

Section 3732 defines Homicide by Vehicle as follows:

> "Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death."

Initially the court notes its disagreement with defendant's contention that Section 3732 is unconstitutional because it "imposes strict criminal liability without any requirement of mens rea." While that may have been the legislature's intent, our Supreme Court has held that the Commonwealth must prove the accused "knew or should have known" he or she engaged in the conduct constituting a violation of the underlying vehicle code section or local ordinance. *Commonwealth v. Field*, 490 Pa. 519, 525, 417 A.2d 160, 163 (1980). Thus, it appears the court has read into Section 3732 a simple negligence culpability requirement.[1]

---

[1]Under Section 3732 the Commonwealth need not show criminal negligence as defined by the Crimes Code (75 Pa. C.S.A. §302(b) (4)). *Commonwealth v. Koch*, 297 Pa. Super. 350, 443 A.2d 1159 (1982).

II

RIPENESS

Subsequent to the Court's November 30, 1982, entry of the order quashing the information, the Commonwealth filed an Application for Reconsideration, arguing for the first time that defendant's equal protection arguements, "as they relate to the cruel and unusual punishment provisions of the Eighth Amendment to the United States Constitution and Article 1, Section 13 of the Pennsylvania Constitution," are not ripe for consideration.[2] For this proposition the Commonwealth cites *Commonwealth v. Lang*, 285 Pa. Super. 34, 426 A.2d 691 (1981).

In *Lang* the lower court quashed an information charging defendant with Vehicular Homicide on the basis it did not allege sufficient causation between his act and the victim's death. The Commonwealth appealed. Defendant cross-appealed, arguing, inter alia, Section 3732 imposes cruel and unusual punishment. The Superior Court refused to consider this argument, holding it was not ripe for review as defendant had been neither convicted nor sentenced. While *Lang* precludes consideration of defendant's cruel and unusual punishment argument, it does not speak to the issue of equal protection.

> "The proper procedure for challenging the validity of a criminal statute is to file a pretrial motion to quash the indictment. Obviously, the purpose of resolving constitutional challenges prior to trial is to conserve time and expense if the challenge is successful." *Commonwealth v. West*, 270 Pa. Super. 301, 311, 411 A.2d 537, 542-43 (1979) (Gates, J., concurring).

---

[2]The Commonwealth's Application for Reconsideration was denied on December 29, 1982.

Defendant's equal protection argument is a facial attack on the constitutionality of classifying Section 3732 as a misdemeanor of the first degree. Constitutional challenges to Section 3732 were addressed on the merits in pre-trial appeals by our appellate courts in *Commonwealth v. Field*, supra, *Commonwealth v. Burt*, 490 Pa. 173, 415 A.2d 89 (1980), and *Commonwealth v. Spurgeon*, 285 Pa. Super. 563, 428 A.2d 189 (1981).

In *Commonwealth v. Danko*, 281 Pa. Super 97, 421 A.2d 1165 (1980), appellant was convicted of criminal solicitation and prostitution. On appeal one of her constitutional attacks on the prostitution statute was that it denied her

> "equal protection of the laws in violation of the Fourteenth Amendment because the prostitute's patron is guilty of only a summary offense under section 5902(e) while the prostitute is guilty of a misdemeanor of the third degree under section 5902(a). Cf. *Commonwealth v. Bonadio, Pa.*, 415 A.2d 47 (1980) (violation of equal protection found where statute made sodomy criminal depending on the defendants' marital status)."

The court held:

> "We may not consider appellant's constitutional arguments. *Although they clearly could have been raised in a pre-trial motion appellant filed no pre-trial motion contesting the constitutionality of section 5902.* See Pa. R. Crim. P., Rule 306. Perhaps her failure to raise her constitutional arguments before trial alone requires this court to find that she waived her facial constitutional challenges to the statute. See *Commonwealth v. Barone*, _____ Pa. Super. _____, 419 A.2d 457, 460-61 (1980) (Opinion by CERONE, P.J., joined by CAVANAUGH, J.); *Commonwealth v. Ashford*, _____ Pa. Super. _____, _____, 407 A.2d 1328, 1330-31 (1979), citing *Commonwealth v. Warren*, 475 Pa. 31, 379, A.2d 561 (1977)."

281 Pa. Super. 100, 421 A.2d 1167 (emphasis added)

However, the court was not required to find a waiver through appellant's failure to raise the equal protection argument pretrial since she also failed to make the argument during trial.

Hence, it appears from the foregoing authorities that not only was the equal protection issue in the present case ripe for consideration by this Court, but defendant's failure to raise it at this stage would probably have precluded him from raising it on appeal in the event of a conviction.

III

EQUAL PROTECTION

Under 18 Pa. C.S. §2504(a),

> "A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person."

> "The state of mind, or *mens rea*, which characterizes involuntary manslaughter is recklessness or gross negligence: a great departure from the standard of ordinary care evidencing a disregard for human life or an indifference to the possible consequences of the actor's conduct. *Commonwealth v. Polimeni*, 474 Pa. 430, 442, 378 A.2d 1189, 1195 (1977); *Commonwealth v. Kominsky*, 240 Pa. Super. 532, 539, 361 A.2d 794 (1976) . . .
>
> Conduct made unlawful by the Motor Vehicle Code is not necessarily the kind of 'unlawful act' included within the definition of involuntary manslaughter, for in many instances, the Code makes unlawful, acts of ordinary negligence."

> *Commonwealth v. Agnew*, 263 Pa. Super 424, 427, 398 A.2d 209, 211 (1979).

Since involuntary manslaughter is classified as a misdemeanor of the first degree (18 Pa. C.S. 2504 (b)), it carries a maximum sentence

of 2-1/2 to 5 years (18 Pa. C.S. §§1104, 1356 (b)). As stated previously Vehicular Homicide is likewise classified.[3] By enacting Section 3732 the legislature intended to "expand the scope of criminal liability for violations of the Vehicle Code causing death." *Commonwealth v. Field*, 490 Pa. at 525 n.4, 417 A.2d at 163 n.4. In *Commonwealth v. Houtz*, the court held that

> "This legislative 'expansion' was accomplished not by the elimination of any of the elements of the crime of involuntary manslaughter, but by a relaxation of the degree of proof of two existing elements: culpable conduct and causation. The crime of involuntary manslaughter, as charged here requires proof that the actor engaged in the Vehicle Code violation in a 'reckless or grossly negligent manner' and that the death was caused 'as a direct result.' 18 Pa. C.S. §2504. See *Commonwealth v. Clowser*, 212 Pa. Super. 208, 239 A.2d 870 (1968). By contrast, under the crime of homicide by vehicle, it must be shown only that the actor 'knew or should have known' that he engaged in the conduct claimed to be in violation of the Vehicle Code, and that, at the very least, death was a 'probable consequence' of the conduct.
>
> *Commonwealth v. Field*, 490 Pa. at 525, 417 A.2d at 163." 469 Pa. 345, 348-9, 437 A.2d 385, 387 (1981)

In nonmotorist involuntary manslaughter cases the Commonwealth must likewise prove beyond a reasonable doubt that defendant's reckless or grossly negligent conduct caused the victim's death. *Commonwealth v. Moore*, 463 Pa. 317, 344 A.2d 850 (1975) (Criminal negligence could have been found where defendant placed a loaded gun in her purse and struggled with victim while defendant's and victim's hands were on gun); *Commonwealth v. Feinburg*, 433 Pa. 558, 253 A.2d 636 (1969) (recklessness found in sale of toxic sterno, where seller knew

---

[3]The instant charge was filed against defendant prior to the effective date of Sentencing Code, 204 Pa. Code Ch. 03, 42 Pa. C.S.A. §9721.

purchasers were alcoholics who would drink it); *Commonwealth v. Gilliland*, 281 Pa. Super 354, 422 A.2d 206 (1980) (evidence insufficient to prove gross negligence where defendant, operating his motor boat on a lake, failed to observe decedent's boat approaching in time to avoid collision); *Commonwealth v. Youngkin*, 285 Pa. Super, 417, 427 A.2d 1356 (1981) (recklessness found where physician "prescribed Tuinal to the decedent in quantities and frequencies term irresponsible and totally inappropriate," ultimately causing her death, where decedent's abuse of the drug had been previously brought to the physician's attention.) 285 Pa. Super at 27, 427 A.2d at 1361.

The issue in the present case can be framed in the following manner: Are motorists prosecuted for causing accidental death being denied equal protection of the law, as compared with nonmotorists who cause accidental death, in that to prove a misdemeanor of the first degree against a motorist the Commonwealth need only prove that the victim's death was a probable result of defendant's simple negligence, whereas to prove a first degree misdemeanor against a nonmotorist in an accidental death case, the prosecution must prove the victim's death was a direct result of at least gross negligence on defendant's part?[4]

---

[4]A motorist-nonmotorist equal protection argument was rejected by the Court of Common Pleas of Adams County on the basis that a "classification based on those persons subject to the provisions of the Vehicle Code and those persons not so subject . . . is rationally related to . . . safety on the highway." *Commonwealth v. Beams*, 10, D & C 3d 616, 617 (1978). One of the bases of the court's decision may have been its incorrect view that *criminal* negligence under 18 Pa. C.S. §302 is required for a vehicular homicide conviction. The same result was reached by the Court of Common Pleas of Potter County, with virtually no discussion of the issue. *Commonwealth v. Clark*, 17 D & C 3d 778, 781, (1981).

That equal protection is denied by section 3732 because it discriminates between vehicle code violators who cause death and those who do not was also rejected in *Beams*, supra, as well as in *Commonwealth v. Sloat*, 11 D & C 3d 745 (York County, 1979). See also, concurring opinion of Judge Popovich in *Commonwealth v. Koch*, supra.

In *Commonwealth v. Field*, supra, our Supreme Court declined to discuss the equal protection arguments raised by appellant in the lower court since they were not pursued on appeal.

In cases not involving a suspect classification the well-recognized applicable rule has been stated thus:

> "The Equal Protection Clause of [the state and federal] constitutions does not deny the State the power to treat different classes of persons in different ways, but does deny the right to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the particular statute. The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Commonwealth v. Bonadio*, 490 Pa. 91, 98, 415 A.2d 47, 51 (1980).

The Commonwealth argues a rational basis exists for such differential treatment of motorists "in that there existed a need for a distinct offense due to the reluctance of juries to convict for involuntary manslaughter." Commonwealth's Brief, p. 2. An increase in the number of first degree misdemeanor convictions for vehicle-related deaths can hardly supply the rational basis needed to justify Section 3732. Otherwise the statute could withstand constitutional attack even if interpreted as imposing strict criminal liability. A conviction cannot be an end in itself.

It cannot be denied that the reduction of vehicular-related accidental deaths is a desirable and proper legislative goal. However, this is equally true for nonvehicle-related accidental deaths. This having been said, the argument may, with surface appeal, be made that the carnage on our highways has reached alarming proportions, and that other methods of attempting to reverse this trend (such as prosecutions for involuntary manslaughter) have proven inadequate. However, this argument assumes that the existence of Section 3732 will significantly reduce the incidence of highway deaths, in that potential Vehicle Code violators will be deterred from such violations.[5] However,

---

[5]It must be borne in mind that the forseeability of death or even bodily injury is not a relevant factor in determining guilt under Section 3732.

it has been correctly observed (in this writer's view) that:

> "The deterrence theory of criminal law is based on hypothesis that the prospective offender knows that he will be punished for any criminal activity, and, therefore, will adjust his behavior to avoid committing a criminal act. This theory rests on the idea of 'rational utility,' i.e., prospective offenders will weigh the evil of the sanction against the gain of the contemplated crime. However, punishment of a negligent offender in no way implements this theory, since the negligent harm-doer is, by definition, unaware of the risk he imposes on society. It is questionable whether holding an individual criminally liable for acts the risks of which he has failed to perceive will deter him [or others] from failing to perceive in the future."
>
> Comment, *Is Criminal Negligence a Defensible Basis for Penal Liability?* 16 Buffalo L. Rev. 749, 751 (1967) (footnotes omitted).[6]

It simply defies common sense, for example, that motorists will be deterred from forgetting to "discontinue" their turn signal "immediately upon completing [a] turn," because they face a possible five years in jail in the extremely unlikely event someone dies as a result of such violation. (75 Pa. C.S. §3334(d)).[7] It should be obvious that more effective methods of deterring Vehicle Code violations exist, such as automatic license suspension or mandatory and stiffer fines for a wider range of traffic offenses. For more serious violations, such as reckless driving or excessive speeding resulting in death, a first degree mis-

---

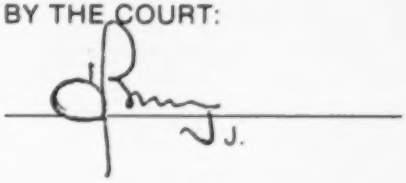
[6]For a scholarly treatment on the same subject, see Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 Colum. L. Rev. 632, 641 (1963).

[7]The underlying Vehicle Code violations charged in the instant case are Driving Under the Influence of Alcohol (§3731), Driving on the Wrong Side of the Roadway (§3311), and Reckless Driving (§3731). However, defendant is attacking Section 3732 "on its face," and not merely "as applied" to him. *Commonwealth v. Bonadio*, supra. The Commonwealth has not argued defendant lacks standing except to the extent he has not yet been convicted or sentenced. See II, supra, of this Opinion.

demeanor classification may pass constitutional muster. Such measures may not be a panacea, but at least they make more sense than saying to the motorists on our highways: "You are entitled to drive recklessly three times with virtually no chance of imprisonment, minimal fines and no license suspension,[8] but if you are lawfully traveling 36 miles per hour and you change lanes after signaling for only 200 feet prior to doing so,[9] and someone dies as a result, you may do hard time with ax murderers."

Accordingly, the criminal information against defendant was properly quashed as violating his rights under the United States and Pennsylvania constitutions.

BY THE COURT:



J.

---

[8]Three points are assessed against a driver for reckless driving. 75 Pa. C.S. §1535. Upon accumulation of 11 points (the first time), PennDot will suspend the license five days for each point. 75 Pa. C.S. §1539.

[9]75 Pa. C.S. §3334(b).

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant	)	
vs.	)	No. 3 W.D. Appeal Docket, 1983
ROBERT HICKS, Appellee	)	

NOTICE OF APPEAL

Defendant, Robert Hicks, hereby appeals to the Supreme Court of the United States of America from the Order and Judgment of the Supreme Court of Pennsylvania entered on the 19th day of October, 1983. This appeal is taken pursuant to 28 U.S.C.S. §1257.

SWENSEN & PERER

Peter B. Skeel, Esquire

CERTIFICATION OF SERVICE

I hereby certify that I am this 28th day of October, 1983 serving the following persons by first class mail, postage prepaid, which service satisfies the requirements of Rule 28.

The Honorable Leroy S. Zimmerman
Attorney General of the Commonwealth
of Pennsylvania
Office of the Attorney General
1531 Strawberry Square
Harrisburg, PA 17120

Robert L. Eberhardt, Esquire
District Attorney's Office
401 Courthouse
Pittsburgh, PA 15219

SWENSEN & PERER

Peter B. Skeel, Esquire

Office - Supreme Court, U.S.
FILED
JAN 27 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1205

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

vs.

ROBERT HICKS,

Appellant.

On Appeal from the
Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

Robert E. Colville
District Attorney of
Allegheny County

Robert L. Eberhardt
Deputy District
Attorney for Law

401 Court House
Pittsburgh, PA 15219
(412) 355-4534

Counsel of Record
for Appellee

QUESTIONS PRESENTED

1. Whether the instant appeal fails to present a "final judgment or decree" for which this Court's jurisdiction pursuant to 28 U.S.C. §1257(2) is properly invoked?

2. Whether the instant appeal does not present a substantial federal question?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	4
ARGUMENT.....	7
I. The instant appeal fails to present a "final judgment or decree" for which this Court's jurisdiction pursuant to 28 U.S.C. §1257(2) is properly invoked.....	7
II. The instant appeal does not present a substantial federal question....	10
CONCLUSION.....	13

TABLE OF AUTHORITIES CITED

Page

Cox Broadcasting Corporation v. Cohn,
420 U.S. 469 (1975)..... 9

Hess v. Pawlowski,
274 U.S. 352 (1927)..... 11

McCullough v. Illinois,
419 U.S. 1043 (1974)..... 12

People v. McCollough,
47 Ill.2d 440, 313 N.E.2d
462 (1974)..... 11

CONSTITUTION

Pennsylvania Constitution,
Article 1, Section 13..... 8

United States Constitution,
Amendment VIII..... 8

United States Constitution,
Amendment XIV, Section 1..... 3, 7

STATUTES

18 Pa. C.S. §2504..... 4, 5

42 Pa. C.S. §722(7)..... 6

75 Pa. C.S. §3731..... 5

75 Pa. C.S. §3732..... 2, 3
5, 7

28 U.S.C. §1257(2)..... 1, 7

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

vs.

ROBERT HICKS,

Appellant.

On Appeal from the
Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

Appellee in the above-captioned case moves to dismiss and/or affirm on the grounds that the appeal does not present a "final order or decree" for which this Court's jurisdiction, pursuant to 28 U.S.C. §1257(2), is properly invoked and that the question presented does not present a substantial federal question.

JURISDICTION

Appellant has filed this direct appeal from the order of the Supreme Court of Pennsylvania, Western District, No. 1 W.D. Appeal Docket, 1983, entered on October 19, 1983. That Court reversed a pre-trial order of the Court of Common Pleas of Allegheny County quashing a criminal information charging appellant under Pennsylvania's homicide by vehicle statute, 75 Pa. C.S. §3732. The Pennsylvania Supreme Court, in reversing the trial court's order remanded the matter for trial.[1] In this procedural status your appellee raises the question whether the jurisdiction of this Court is properly invoked and/or should be exercised.

---

[1] Trial in this matter is scheduled, at the time of this writing, for February 15, 1984. Appellant has not sought a stay of those proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION AMENDMENT XIV

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

75 P.S. §3732. Homicide by vehicle

Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance apply to the operation or

use of a vehicle or to the regulation of traffic is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death.

1976, June 17, P.L. 162, No. 81 §1, eff. July 1, 1977.

18 P.S. §2504. Involuntary manslaughter

(a) General rule.-- A person is guilty of involuntary manslaughter when a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, he causes the death of another person.

(b) Grading.-- Involuntary manslaughter is a misdemeanor of the first degree.

1972, Dec. 6, P.L. 1482, No. 334, §1, effective June 6, 1973.

STATEMENT OF THE CASE

Appellant seeks to appeal to this Court from the Order and Opinion of the Supreme Court of Pennsylvania entered in the matter

reversing the pre-trial order of the lower court quashing a criminal information filed against appellant.

Appellant was charged with violations of Pennsylvania's homicide by vehicle statute, 75 Pa. C.S. §3732, and driving under the influence statute, 75 Pa. C.S. §3731, as a result of an incident on April 3, 1982. Pre-trial motions filed by appellant challenged, inter alia, the constitutionality of the homicide by vehicle statute as a denial of equal protection and due process in the classification of the offense viz a viz, involuntary manslaughter, 18 Pa. C.S. §2504. Appellant also filed a Motion for Writ of Habeas Corpus as to the charge of driving under the influence of alcohol or controlled substance. On November 30, 1982, the pre-trial hearing court granted appellant's pre-trial motion to quash the information and denied the motion for writ of habeas corpus as to the

driving under the influence charge. The Commonwealth filed an appeal to the Supreme Court of Pennsylvania from the order granting the motion to quash the criminal information pursuant to Pennsylvania law, 42 Pa. C.S. §722(7), at No. 1 W.D. Appeal Docket, 1983. Appellant sought to appeal the order denying the motion for a writ of habeas corpus, but that appeal, at No. 3 W.D. Appeal Docket, 1983, was quashed by the Supreme Court of Pennsylvania on motion of the Commonwealth.[2]

A unanimous Pennsylvania Supreme Court reversed the order of the trial court and remanded the matter for trial. In so doing, the Pennsylvania Court determined that the

---

[2] The Commonwealth notes that the notice of appeal filed by appellant in this Court is designated as from the order at No. 3 W.D. Appeal Docket, 1983, dated October 19, 1983. The Commonwealth does not dispute appellant's true intent is to appeal from the order at No. 1 W.D. Appeal Docket, 1983.

statute at issue, 75 Pa. C.S. §3732 did not violate either Fourteenth Amendment equal protection principles or equivalent state constitutional provisions since the legislative classification was rationally related to a legitimate state goal.

ARGUMENT

I

THE INSTANT APPEAL FAILS TO PRESENT A "FINAL JUDGMENT OR DECREE" FOR WHICH THIS COURT'S JURISDICTION PURSUANT TO 28 U.S.C. §1257(2) IS PROPERLY INVOKED.

Appellant seeks to invoke the provisions of 28 U.S.C. §1257(2) as the basis for this Court's jurisdiction to entertain an appeal from the reversal of a pre-trial order in a state Court proceeding on a federal question, where the matter has been remanded for further proceedings, including trial, where other state and federal issues are to be resolved.

Appellant raised additional issues in his pre-trial motion which were not reviewed

by the Pennsylvania Supreme Court. A challenge to the sufficiency of the evidence was raised by way of a state habeas corpus motion which was denied by the pre-trial hearing court and not then reviewed by the Pennsylvania Supreme Court. Also, appellant additionally raised allegations of cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Article 1, Section 13 of the Pennsylvania Constitution arising from enforcement of the statute at issue. This argument was not ruled upon at the trial level, nor by the Supreme Court of Pennsylvania, since the issue lacked ripeness. Thus, your appellee submits, additional issues, both federal and non-federal, remain to be decided below.

In this procedural posture, therefore, your appellee submits that the instant matter fits into that category of cases

described as the fourth categroy of cases where the highest court of a State has finally determined a federal issue in a particular case, but in which there are further proceedings in the lower state courts to come. In Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 482-483 (1975) this Court found its jurisdiction would be properly invoked under circumstances similar to those of the instant case where "a refusal immediately to review the state court decision might seriously erode federal policy."

It is submitted that the jurisdiction of this Honorable Court is not properly invoked under the circumstances of the instant matter where appellant may prevail on other federal or non-federal grounds either at his trial on February 15, 1984, or in another state court proceeding, and no erosion of federal policy will occur in the meantime.

II

THE INSTANT APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Jurisdictional Statement filed by appellant fails to establish that a substantial federal question is involved in the instant appeal.

Appellant seeks to have this Court decide that the Pennsylvania legislature denies the appellant equal protection of the laws by defining a crime of homicide by vehicle to include a culpability requirement that differs from that applicable to other unintentional homicides committed in Pennsylvania with other instrumentalities. It is clear that classification of homicides committed unintentionally but caused by a violation of the motor vehicle code is reasonably related to a legitimate state interest, the reduction of highway fatalities. Since the classification is so

clearly a proper one for the Commonwealth of Pennsylvania to make in the exercise of the legislative function, no substantial federal question arises under the equal protection clause of the Fourteenth Amendment.

This Court has long recognized that the regulation of the use of motor vehicles is an area where a state has a legitimate interest arising from the serious dangers posed to persons and property by their operation. Hess v. Pawlowski, 274 U.S. 352 (1927).

This Court failed to find a substantial federal question involving equal protection arising from a state statutory scheme that provided for the same elements, but differing penalties, in two forms of unintentional homicide that may be committed with an automobile as an instrumentality. People v. McCollough, 47 Ill. 2d 440, 313 N.E. 2d 462 (1974), appeal

dismissed McCullough v. Illinois, 419 U.S. 1043 (1974). Similarly it is submitted, a substantial federal question based on equal protection is not presented in the instant matter where separate distinct elements are defined for homicides unintentionally committed through use of a motor vehicle in violation of the vehicle code and those unintentional homicides committed with other instrumentalities.

CONCLUSION

The instant matter does not represent a proper invocation of this Court's jurisdiction, nor does it present a substantial federal question. On that basis, your appellee respectfully moves this Court to dismiss the instant appeal and/or affirm the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

ROBERT E. COLVILLE
District Attorney of
Allegheny County

ROBERT L. EBERHARDT
Deputy District
Attorney for Law

Counsel of Record
for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I am this 25th day of January, 1984, serving the following persons by first class mail, postage prepaid, with three (3) copies of the Motion to Dismiss or Affirm, which service satisfies the requirements of Rule 28:

The Honorable Leroy S. Zimmerman
Attorney General of the Commonwealth
of Pennsylvania
Office of the Attorney General
1531 Strawberry Square
Harrisburg, PA 17120

Peter B. Skeel, Esquire
Swensen & Perer
2201 Lawyers Building
Pittsburgh, PA 15219

ROBERT E. COLVILLE
DISTRICT ATTORNEY

By Robert L. Eberhardt
ROBERT L. EBERHARDT
DEPUTY DISTRICT
ATTORNEY FOR LAW